



Board of Adjustment



**Agenda Numbers:** 5 & 6  
**Case Numbers:** BA-90014/ZA-90093  
BA-20100003/ZA-90092  
**Hearing Date:** April 7, 2010

**Appellant:** Richard Valdez  
826 Arthur Dr. SW  
Albuquerque, NM 87105

**Agent:** N/A

**Applicant:** Richard Valdez  
826 Arthur Dr. SW  
Albuquerque, NM 87105

**Agent:** N/A

**Site Location:** 826 Arthur Dr. SW

**Zone Designation:** R-1 Single-Family Residential

**Recommendations:** Denial

VICINITY MAP

**Summary:** These requests are appeals of the Zoning Administrator's denial of conditional use approval to allow an accessory building in excess of 600 square feet in area (989-sq. ft. detached garage) and a variance of 4 feet to the required separation distance between a single-family dwelling unit and an accessory building.

The conditional use appeal (BA-90014/ZA-90093) was deferred by the Board of Adjustment from the February 2010 and November 2009 meetings to allow the appellant an additional opportunity to appeal the variance request (BA-20100003/ZA-90092). Both matters pertain to an unpermitted garage in the rear yard of the subject property, located just six (6) feet from the existing house.

**Staff Contact:** Brennon Williams, Zoning Administrator

**Attachments:**

1. Board of Adjustment's Deferrals (February 8, 2010 & November 9, 2009)
2. Appeal applications
3. Notices of Decision (August 18, 2009)
4. Original applications and provided site plan
5. Agency comments for ZA applications
6. Site photographs, aerial photograph, zone atlas page

BA-90014/ZA-90093

Richard Valdez appeals the Zoning Administrator's denial of a conditional use to allow an accessory building in excess of 600 square feet in area (989-sq. ft. detached garage) on Tract 24, Babes Addition, located at 826 Arthur Dr. SW, zoned R-1, and containing .177 acres. (M-13) (Original request submitted by Richard Valdez) (DEFERRED FROM THE FEBRUARY 3, 2010 HEARING)

BA-20100003/ZA-90092

Richard Valdez appeals the Zoning Administrator's denial of a variance of 4 feet to the required separation distance between a dwelling unit and an accessory building on Tract 24, Babes Addition, located at 826 Arthur Dr. SW, zoned R-1, and containing .177 acres. (M-13) (Original request submitted by Richard Valdez)

## **BACKGROUND**

### **The Requests**

The appellant is requesting that conditional use approval to allow an accessory building in excess of 600 square feet in area (989-sq. ft. detached garage) and a variance of 4 feet to the required separation distance between a dwelling unit and the subject accessory building be approved. Both of these requests were denied by the Zoning Administrator at the public hearing held in August 2009.

### **The Property**

The subject site is located at 826 Arthur Dr. SW, zoned R-1, and is approximately .177 acres in area. The property is currently developed with a single-family dwelling and the subject accessory building.

### **The Hearing**

The requests were presented at the Zoning Administration hearing held on August 11, 2009. Richard Valdez, the property owner, presented the request. Mr. Valdez testified that he constructed the detached garage in the rear yard of the property approximately three years earlier. He stated that although he was unaware that a construction permit was needed, he was confident that the existing structure would meet current building code requirements.

### **The Decisions**

The Zoning Administrator denied both requests based on findings that the property owner had failed to justify the proposals in accordance with the criteria for approval as outline in the Zoning Ordinance. Specifically, without the ability of the unpermitted garage to meet the applicable separation distance, the property was determined to be inadequate in size and shape to accommodate the accessory building [reference Section 24.A.2.i.(1)], and resulted in an adverse effect on the neighborhood and conflicted with the character of the area [reference Section 24.A.2.i.(3)]. Additionally, no evidence was presented to show how the property possessed "peculiar, exceptional, and unusual circumstances" to justify varying the separation distance; nor was it shown that the proposal was limited to the extent necessary to allow the owner reasonable use of the property [reference Section 24.A.2.h.(1)].

## **APPLICABLE REGULATIONS**

### **Comprehensive Zoning Ordinance of Bernalillo County.**

#### Section 9. R-1 Single-Family Residential Zone.

- A. The regulations set forth in this section or set forth elsewhere in this ordinance, when referred to in this section, are the regulations in the R-1 Residential Zone. The purpose of this zone is to provide for the development of single-family homes on lots not less than three-quarters [of an] acre in area, except that where community water and sewer facilities are made available, the lot size may be reduced consistent with development densities in the Albuquerque/Bernalillo County Comprehensive Plan. The regulations provide for the health, safety and welfare of the residents.

B. Use Regulations. A building or premises shall be used only for the following purposes, all uses customarily incidental to the building or premises shall be maintained on site:

1. Prohibited Uses. The following uses are prohibited in this zone:

- a. The open storage of inoperative vehicles or auto parts;
- b. The open storage of trash or junk;
- c. The open storage of large appliances;
- d. Any use not designated a permissive use or conditional use in this zone, unless otherwise authorized by this Code; or
- e. Any use not recognized as customarily incidental to a permitted use in this zone.

2. Permissive Uses:

- a. Agricultural activity, including truck gardening and nurseries, fur bearing animal farm, the raising of poultry or rabbits, dairy farming, livestock grazing, feeding, and the raising of livestock on lots containing three acres or more. On lots of less than three acres, there shall be at least 10,000 square feet of lot area for each cow or horse, and/or at least 4,000 square feet of lot area for each sheep, pig, or goat, provided that any building, pen, or corral where such animal is located is at least 20 feet from any existing dwelling unit. Stands for the display or sale of home-raised agricultural products, including poultry or rabbits raised on the premises.
- b. One single-family dwelling or H.U.D. Zone Code II manufactured home per lot.
- c. Accessory building, structure, or use customarily incidental to the above uses, such building or structure shall be limited to an area of 600 square feet or less.
- d. Noncommercial library, museum, and art gallery.
- e. Recreational vehicle or boat storage in the rear yard when such recreational vehicle or boat is not to be used as accessory living quarters, and is not connected to utilities, other than temporarily to a source of electricity. Recreational vehicle used for dwelling purposes served only by electricity for lighting purposes, the use of such recreational vehicle shall be limited to a maximum of two weeks in any calendar year.
  1. In the event where rear yard access is not available, outside parking in the front yard is allowed, provided:
    - (a) The body of the recreational vehicle or boat is at least 11 feet from the front property line.
    - (b) No part of the unit extends onto the public right-of-way.
    - (c) A corner lot is always deemed to have reasonable access to the rear yard; a fence or wall is not necessarily deemed to prevent reasonable access.
- f. Signs not exceeding eight square feet in area pertaining to the lease, hire, or sale of a premises or sale of home-raised products, provided there shall be no more than one such sign on each lot and provided further that, if illuminated, the source of such illumination shall be nonoscillating and nonflashing.
- g. Parking incidental to uses permitted in this zone, provided all vehicles which are not parked inside a building are operative and are not wholly or partially dismantled.
- h. Home occupation.
- i. Concealed Wireless Telecommunications Facility, provided that it satisfies the requirements of section 22.5 of this ordinance.
- j. Wireless Telecommunications Antenna located on a public utility structure, provided that it satisfies the requirements of section 22.5 of this ordinance.
- k. Amateur Radio Antenna/Tower up to 65 feet as measured from grade.
- l. Garage or yard sale, provided:
  1. No more than four events are allowed at a given dwelling in any calendar year. The duration of the garage or yard sale shall not exceed three consecutive days.
  2. No items shall be purchased for a garage or yard sale for the purpose of resale; items shall be of the type normally accumulated by a household.
  3. One non-illuminated, on-premise sign, not exceeding four square feet in area shall be permitted. The sign shall pertain to the garage or yard sale only and shall be permitted only for the three-day period of the sale.

3. Conditional Uses. The following uses may be permitted if approved by the Zoning Administrator in accordance with the procedures and under the conditions set out in the administrative Section of this ordinance with additional requirements deemed necessary to safeguard the best interest of the adjoining property, neighborhood and the community.
- a. Accessory building or structure in excess of 600 square feet in area and incidental to the uses listed under Section 7.B.1. and 7.B.2.
  - b. Amateur Radio Antenna/Tower 65 to 100 feet as measured from grade.
  - c. Church and incidental facilities.
  - d. School.
  - e. Day Care Center.
  - f. Family Day Care Home.
  - g. Temporary festivals, circuses, carnivals or activities in a tent, provided that the use or activity meets the following requirements:
    - (1) The minimum lot size per use or activity shall be five acres.
    - (2) All required parking shall be located on the same site with the activity or use.
    - (3) The use or activity shall be at least two miles from the nearest conforming residential use.
    - (4) Prior approval of the proposed use or activity must be obtained from the County Sheriff, County Fire Department, County Environmental Health, County Public Works, City of Albuquerque Air Pollution Control, and Albuquerque Metropolitan Arroyo Flood Control Authority or their authorized representative.
    - (5) The hours of operation, shall be between 6:00 a.m. and 8:00 p.m. This includes the time of erection and dismantling.
    - (6) The use or activity shall be limited to three days in one calendar year.
    - (7) No permanent structures shall be erected.
    - (8) Temporary fencing may be erected, and shall be removed within 24 hours after the activity.
  - h. Real estate sales office and real estate signs exceeding the limitations in Subsection 8.B.(1).f. above in connection with a specific development for a period of not more than two years.
  - i. Recreational facility (nonprofit) such as swimming pools or tennis clubs on sites containing not less than one acre.
  - j. Temporary storage building or yard for equipment, material or activity incidental to a specific construction project but not to exceed one year, unless the time is extended by the Zoning Administrator.
  - k. Mobile home used as a dwelling (with connections to any utilities) during construction of a dwelling on the same premises, provided such use shall be limited to a maximum period of 24 months.
  - l. One mobile home for a three-year period in addition to an existing single-family dwelling or mobile home on a lot provided it complies with the following requirements:
    - (1) The mobile home may be used only by members of the immediate family for the purpose of providing assistance to those members of the family who are elderly, ill, mentally or physically disabled as attested by a licensed physician.
    - (2) The mobile home shall be connected to water and sewage disposal facilities approved by the Department of Environmental Health.
    - (3) The mobile home must be placed on the property in conformance with the setback requirements and located at least 15 feet from any structures on the same or on adjoining property.
    - (4) Placement of a mobile home on the property will not seriously conflict with the character of the area or be detrimental to the values of surrounding properties.
  - m. Nonprofit animal facility.
  - n. Park.
  - o. Home occupation where the business includes visits to the site from clients, customers, patients, patrons, or similar individuals. Such home occupations may allow for employment of one non-family member and may be approved for a period of time not to exceed three years.

C. Height Regulations. Buildings and structures shall not exceed 26 feet or 2 1/2 stories in height, except as provided in The Supplementary Height and Area Regulations Section of this ordinance.

D. Area Regulations:

1. Minimum Lot Area and Lot Width. Every lot shall have a minimum area of not less than three-quarters [of an] acre and a minimum lot width of 60 feet, except that where community water and sewer facilities are available, the lot area may be decreased to 8,000 square feet if located in the Developing, Established or Central Urban Areas, or 14,520 square feet if located in the Semi-Urban Area of the Albuquerque/Bernalillo County Comprehensive Plan.
  2. Front Yard.
    - a. There shall be a front yard having a depth of not less than 20 feet except as provided in the Supplementary Height and Area Regulations Section of this ordinance.
    - b. Where lots have double frontage, the required front yard shall be provided on both streets.
  3. Side Yard:
    - a. Except as hereinafter provided in the following paragraph and in the Supplementary Height and Area Regulations Section of this ordinance, there shall be a side yard on both sides of a building the aggregate width of which shall be not less than 14 feet, provided, however, that neither such yard shall be less than six feet in width.
    - b. Wherever a lot of record, at the effective date of this ordinance, has a width of less than 60 feet, each side yard may be reduced to a width of not less than ten percent of the width of the lot, but in no instance shall it be less than three feet.
  4. Rear Yard. Except as hereinafter provided in the Supplementary Height and Area Regulations Section of this ordinance, there shall be a rear yard having a depth of not less than 15 feet.
- E. Parking Requirements. Off-street parking for all uses must be provided in accordance with the regulations set forth in the Off-street Parking, Loading and Unloading Regulations Section of this ordinance.

Section 22.D. Supplementary Height and Area Regulations. Modification of Area Regulations.

2. Accessory Building and Structures:
  - f. Any accessory building shall be at least ten feet from any dwelling or accessory living quarters except that any accessory building which does not contain living quarters may be closer than ten feet to another accessory building which does not contain living quarters; provided, however, that if there is no common wall between such accessory buildings or if the wall are not adjoining, there shall be at least five feet between the accessory buildings. No accessory building may extend across the width of the yard unless a passage of at least five feet is provided at some point along such width.

Section 24.A..2. Administration. Zoning Administrator. Powers and Duties.

- h. Investigation of Applications:
  - (1) Investigate all applications for variances from the height, area, parking or density regulations of this ordinance, and to grant such applications to the extent necessary to permit the owner reasonable use of his land in those specified instances where there are peculiar, exceptional, and unusual circumstances in connection with a specific parcel of land, which circumstances are not generally found within the locality or neighborhood concerned.
  - (2) Investigate all applications for an extension of the time limitations authorized by the Nonconforming Use Regulations Section of this ordinance or for an expansion of up to 25 percent of the original floor area for residential uses in residential zones, and to grant such applications if the use does not seriously conflict with the character of the surrounding area and in case of expansion of the use the site is adequate in size and shape to accommodate such expansion and the expansion does not increase the number of dwelling units on the lot or in any structure.
- i. Investigate all applications for conditional use permits authorized in this ordinance, and grant such applications if he finds:
  - (1) That the site for the proposed use is adequate in size and shape to accommodate such use, and all yards, open spaces, walls and fences, parking, loading, landscaping, and other

features required by this ordinance to adjust such use to the land use pattern in the neighborhood.

- (2) That the site for the proposed use can be developed in such manner that undue traffic congestion or hazards will not be created.
- (3) That the proposed use will have no adverse effect on the neighborhood or seriously conflict with the character of the area.
- (4) That any conditions are deemed necessary to protect the public health, safety, and general welfare. Such conditions may include requirements relative to:
  - (a) Open space and buffers.
  - (b) Walls and fences.
  - (c) Surfacing of parking areas.
  - (d) Location of points of vehicular egress and ingress.
  - (e) Signs.
  - (f) Landscaping and maintenance thereof.
  - (g) Noise, vibration, odor, and health hazards.
  - (h) Such other conditions as will make possible the development of the county in an orderly, efficient manner, and in conformity with the intended purpose of this ordinance.

### **Agency Comments**

Comments received for this request from the Bernalillo County Building Department stated that building permits would be required for the project.

### **INFORMATION SUBMITTED FOR THE APPEALS**

The appellant provides similar justification for both appeals (all work has been done “up to code”, property owner’s willingness to “cooperate”, removal of building would be too costly), but does not address the criteria for approval of a conditional use or a variance as outlined in the zoning ordinance. Although these reasons help to illustrate the owner’s commitment to allow the building to stay “as is”, these factors are unrelated to the standards used to determine whether the development of the property is consistent with the intent and protections of the ordinance.

### **ANALYSIS OF SUBMITTED MATERIAL**

Compliance with all applicable regulations for structural integrity, safety aspects, and proper placement is central to the determination of a building’s ability to meet minimum development standards (i.e., being “up to code”). No one regulation can be singled out as being more essential or important than another. In order for the accessory building to be accurately and factually described as being built “up to code”, a construction permit must be obtained, the building needs to be properly placed to meet the 10-foot separation requirement, and all related inspections must be conducted. These standards are the minimum necessary to allow for development.

More accurately, if the property owner is truly willing to cooperate, the existing building can be modified to meet the required separation distance, a construction permit for the existing structure can be obtained, and the necessary inspections can take place. This option will result in the owner’s ability to withdraw the variance request, and would appear to properly address the conditional use criteria. However, as currently presented, the variance is only sought in order to correct the problems created by the owner when the building was constructed without the required permit. Variances are not intended to correct or “make legal” development that has been constructed incorrectly, improperly, or mistakenly. Problems that a property owner has either created themselves or inherited through purchase cannot be made right through the granting of a waiver to the required standard. Commonly referred to as a “self-created hardship”, these difficulties bear no substantiation for approval.

### **Analysis Summary**

BA-90014/ZA-90093 – conditional use

CRITERIA	APPEAL INFORMATION	STAFF ANALYSIS
Property is adequate in size & shape?	- This issue has not been addressed in the materials provided for the appeal.	- In its current size and layout, the accessory building does not meet the required 10-foot separation distance from the existing dwelling unit on the property.
Property can be developed to avoid traffic congestion/hazards?	- This issue has not been addressed in the materials provided for the appeal.	- The existing area of the site appears to be adequate to allow for proper ingress, egress, and off-street parking requirements. No adverse comment or concern about possible traffic problems was determined by the Public Works Division for this request.
Use will not be detrimental to surrounding properties?	<ul style="list-style-type: none"> <li>- The appellant indicates that all work on the building has been done "up to code".</li> <li>- The appellant states that the continued placement of the building in the rear yard (located too close to the existing dwelling unit) will not have an adverse impact.</li> <li>- The appellant cites a lack of neighborhood opposition.</li> </ul>	<ul style="list-style-type: none"> <li>- True "code" compliance means that all minimum standards related to construction are met.</li> <li>- Noncompliance with zoning regulations and the specified intent of the ordinance can only be interpreted as creating an adverse impact, both on the subject site and the surrounding area.</li> <li>- Neighborhood support or opposition is not considered for conditional use requests.</li> </ul>

BA-20100003/ZA-90092 – variance

CRITERIA	APPEAL INFORMATION	STAFF ANALYSIS
Property possesses peculiar, exceptional, and unusual circumstances?	- This issue has not been addressed in the materials provided for the appeal.	- The property does not possess peculiar, exceptional, and unusual circumstances. It is similar in size, shape, area, and topography to other lots in the neighborhood.
The unique circumstances of the property are not generally found within the locality or neighborhood?	- This issue has not been addressed in the materials provided for the appeal.	- Without the existence of unique circumstances, the proposal does not meet the criteria for approval.
The proposed variation is to the extent necessary to allow reasonable use of the land?	- This issue has not been addressed in the materials provided for the appeal.	- Reasonable use of the property can be demonstrated through the existence of the dwelling currently on the property.

## CONCLUSION

The Zoning Ordinance authorizes the Board of Adjustment to hear and determine appeals from the decisions of the Zoning Administrator in denying applications for conditional use permits authorized by the ordinance, as well as requests to vary specific development standards. However, without clear and convincing evidence related to the criteria for approval, staff respectfully submits these matters to the BA with the following recommendations:

**RECOMMENDATIONS**

Denial of BA-90014/ZA-90093, thereby upholding the previous determination of the Zoning Administrator; and

Denial of BA-20100003/ZA-90092, thereby upholding the previous determination of the Zoning Administrator.

Brennon Williams  
Zoning Administrator